

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 09 March 2006

BALCA Case No.: 2005-INA-00007
ETA Case No.: P2004-NJ-02506497

In the Matter of:

ERC CONSTRUCTION CO.,
Employer,

on behalf of

CEZAR C. SIMONINE,
Alien.

Appearance: Cassandre C. Lamarre, Esquire
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone¹**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises out of an application for labor certification² on behalf of Cezar

¹ Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

² Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). This application was filed prior to the effective date of the “PERM” regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

C. Simonine (hereinafter “the Alien”) filed by the ERC Construction Co. (hereinafter “the Employer”) for the position of “stone mason.” The Certifying Officer (hereinafter “CO”) denied the application and this appeal ensued.

STATEMENT OF THE CASE

The Employer filed the application for labor certification on December 21, 2001. (AF 5-8, AF 43-46).³ The position was listed in the application as “stonemason.” The Employer described the job duties of a stonemason as follows:

Layed [sic] materials such as stone for commercial and residential development projects. Poured, spread and finished all stone repair and builds foundations, walls, sidewalks, porches, steps, stairways, fireplaces, bbq pits, arches, abutments, and sewers. Cut stone according to written specifications and shapes them preparatory to setting using chisel, hammer, grinder, power saw. Aligned stone with plumbing and creates geometric patterns. Spread mortar over stone & sets them in place by hand or by crane. Cleaned surface using muriatic acid and brushes. Supervises one mason helper.

(AF 43). The position required three years of experience in the job offered. (AF 35). The Employer filed a request for Reduction in Recruitment (hereinafter “RIR”) processing with its application for certification. (AF 36).

On June 16, 2004, the CO issued a Notice of Findings (hereinafter “NOF”) indicating her intent to deny certification pursuant to 20 C.F.R. § 656.3, which defines “employer” as a person, association, firm or corporation which currently has a location within the United States to which U.S. workers may be referred for employment and defines “employment” as permanent, full-time work by employee for an employer other than oneself, as well as 20 C.F.R. § 656.20(c)(8), which requires the employer to document that the job opportunity has been and is clearly open to any qualified U.S. worker. (AF 26-27). The CO initially noted that the Employer had two labor certification applications before her office and one application pending before the New Jersey

³ Citations to the Appeal File are abbreviated as “AF.”

State Office. In the present application, the Employer's address was listed as 72 Madison Street, Newark, New Jersey, which is also the address shown on the attorney's G-28 form. In the second application before the CO's office, the Employer listed the same Madison Street address and the attorney's G-28 form showed a different address, 1847 Dell Avenue, Linden, New Jersey. In the third case pending in the state office, the Employer listed the same Madison Street address again and the attorney's G-28 form again showed the Linden, New Jersey address. The CO requested documentation to establish the Employer's actual address and explain what exactly is located at the Linden, New Jersey address.

The CO then advised the Employer that there was no listing for the Employer's company name or Federal Employment Identification Number (hereinafter "FEIN") in the New Jersey Unemployment Insurance computer system. Thus, the CO instructed the Employer to "document why there is no record of his firm in the State UI system" and furnish copies of New Jersey's required "Employer's Quarterly Report" and "Form W-30 Employer Report of Wages Paid for all quarters beginning July 1, 2001 through March, 2004." (AF 27). Moreover, because the listed owner, Enrique R. Carballo, signed the form and listed the previous FEIN number to be the same as the present one, the CO asked the Employer to explain whether the applicant has ever applied for an employer identification number for this or any other business.

Additionally, based on the certificate of incorporation of ERC Construction, Inc., it appears that both Enrique R. Carballo and Edmardo Rodriques sit on the Board of Directors and together incorporated the company. Therefore, the CO sought documentation about the history of the business from inception to date and the identity of the owners and officers over the course of time. Also, because Enrique R. Carballo checked that the employer was a "sole proprietorship" but then crossed that out, the CO sought information about whether the company was always a corporation or was a different kind of entity at some point. To assess the status of the employer, the CO requested information about the roles that Mr. Carballo and Mr. Rodriques play in the company. Finally, the CO sought clarification about the SS-4 and why Mr. Carballo's signatures in two places are dated 10 months from one another and why the faxed date is earlier than either signature date. The CO also requested that items 12 to 14 be completed or an explanation given about why they were left blank. (AF 28)

Furthermore, since the Employer sought to employ three additional stonemasons who can be guaranteed permanent, full-time, year round employment, the CO requested information regarding the number of workers the Employer employed from 2001 to the present, their names, job duties, and their status as full- or part-time employees or non-employees. The Employer was also directed to submit copies of the employees' W-2 or 1099-MISC forms for the years 2001, 2002, and 2003, along with "copies of contracts, invoices, etc. for 2001, 2002, 2003 and currently," which include documentation about the winter months. The CO further advised that if the Employer indicates it has employees, it must document why there is no listing for the company in the State Unemployment Insurance system; and, if the company is listed, the CO instructed the Employer to furnish the corresponding name and number. (AF 28).

Finally, the CO advised that the records indicated that Edmardo Rodriques owns another business called Tetra Universal Construction Co, which lists the same address as ERC Construction, and that Mr. Rodriques sought labor certification as owner of that company. Accordingly, the CO directed the Employer to provide information about the kind of construction in which each firm specializes, how the firms relate to one another, and what role Mr. Rodriques plays in both companies. (AF 28)

In rebuttal, the Employer submitted a cover letter from the owner, Enrique Carballo, indicating that "the attorney wrote someone else's address on the G-28," thus explaining the address discrepancy. (AF 19). The Employer also attached a list of employees since 2001 and a copy of the phone bill. (AF 19-22). He additionally attached a workers' compensation audit form. (AF 23-25). He explained that he claims his company under his personal taxes and pays out 1099's (non-employee compensation) for his employees. (AF 17-19). He further explained that he does not use contracts and destroys invoices when they have been paid. Mr. Carballo stated that Mr. Rodriques is a 30 percent partner in the business but that Mr. Carballo runs the day-to-day operations, and he does not know whether Mr. Rodriques owns another company. With regard to the date discrepancies on the SS-4 and his use of the previous FEIN number, the Employer explained that he previously owned a business, for which he had a FEIN number, but since he no longer used that number he reapplied for the same number. On November 8, 1999,

Mr. Carballo filed the form by fax, but his application was returned to him because he had not furnished an original signature. Therefore, on September 21, 2000, Mr. Carballo mailed the SS-4 form with original signature. Mr. Carballo also submitted the incorporation paperwork in September 2001 at Mr. Rodriques' urging. Mr. Carballo emphasized his role in the business, which includes running the business on a day-to-day basis and differentiated the role of Mr. Rodriques, who helps Mr. Carballo with the business dealings. The Employer specializes in masonry. (AF 19).

On August 6, 2004, the CO issued a Final Determination (hereinafter "FD") denying labor certification. (AF 14-16). Citing to 20 C.F.R. §§ 656.3 and 656.20(c), the CO noted that the Employer satisfactorily documented its status as an "employer;" however, the Employer failed to document a *bona fide* permanent, full-time position, which is open to qualified U.S. workers. (AF 14-16). The CO noted that there remained no record of the company in the New Jersey Unemployment Insurance system, and that the Employer failed to furnish copies of the NJ-927 Employer's Quarterly Report and the W-30 Employer Report of Wages Paid as instructed. The CO had directed the Employer to furnish these documents in order to show that the workers for whom the Employer submitted W-2's are actually employees. Accordingly, the CO concluded that because "[a]ll employers subject to the provisions of the Unemployment Insurance Law are required to file these forms," "[f]ailure to do so is a violation of 20 C.F.R. § 656.20(c)," which states that an employer's job opportunity terms, conditions, and occupational environment shall not be contrary to State or Federal law. (AF 15).

Moreover, the NOF asked the Employer to document "how he can guarantee permanent full-time work by an employee for an employer other than oneself..." Mr. Rodriques and Mr. Carballo are both listed as incorporators of ERC Construction, Inc., yet Mr. Rodriques, who signed the 7-50A form as employer/owner, did not submit any rebuttal. Only Mr. Carballo, who did not sign the 7-50A form, responded. Additional documentation sought by the CO in the NOF, which would have substantiated the existence of the corporation, was not submitted. Instead, Mr. Carballo explained that he did not provide contracts or invoices because he did not have contracts and had already disposed of invoices, and that he claims his company under his personal taxes even though the Certificate of Incorporation indicates the company is a

corporation and thus requires a Corporate Tax Return. Regardless, Mr. Carballo did not provide the 1099's or any other tax information to document how he pays his employees.

By letter dated September 3, 2004, the Employer filed a request for review of the CO's Final Determination before the Board of Alien Labor Certification Appeals (hereinafter "the Board"). (AF 1). The Employer claims that it did not submit 1099's because it cannot release those documents without permission from the employees. Moreover, Mr. Carballo claimed the company under his personal taxes in 2001 and 2002 but filed a corporate tax return in 2003 at the request of the IRS (Internal Revenue Service), which he included with the documentation he submitted. The Employer insists that its tax form from 2003, employee list, and statement document the company's ability "to support a full-time employee to perform the duties described in the 750 forms." (AF 1). The case was docketed with the Board on October 22, 2004.

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Here, the CO explicitly directed the Employer to submit service contracts documenting the existence of a *bona fide* job opportunity and its ability to provide permanent, full-time employment for a stonemason. In response, the Employer explained that he does not use contracts and destroys invoices when they have been paid.

As the CO explained, the Employer was required to submit documentation establishing that a *bona fide* opportunity exists. In other words, the Employer had to sufficiently prove that the position of stonemason is a true, permanent and full-time job at ERC Construction, not simply a position that exists on paper.⁴ Thus, a list of company employees since 2001 is insufficient to meet the Employer's burden. Although the listing detailed the occupation of each employee, there was no explanation about the increased need for stonemasons at this time relative to past years and whether the present need for a stone mason was full-time and

⁴ *See Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

permanent. If an employer's evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Moreover, the Employer did not supply sufficient explanation for its failure to submit an NJ-927 Employer's Quarterly Report or a W-30 Employer Report of Wages Paid to establish that it in fact has employees as instructed by the CO. If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). Moreover, if the CO's request for documentation having a direct bearing on the resolution of an issue is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Here, the Employer provided nothing more than a list of a few employees who have been employed since 2001 and an explanation that he does not use contracts or maintain old invoices.⁵

Although an employer's written assertion constitutes documentation under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Thus, even though the Employer insists that it does not execute service contracts or keep records of invoices, the Employer was required to produce sufficient documentation establishing that a permanent, full-time stonemason position exists, such as an invoice or billing summary setting forth the type of or amount of work performed by a stonemason for a particular project. The Employer provided none. In addition, without proof that the Employer is not violating the Unemployment Insurance Law, the Employer has not rebutted that it is violating 20 C.F.R. § 656.20(c)(7), which states that an employer's job opportunity terms, conditions and occupational environment shall not be contrary to State or Federal law. Thus, the Employer has not met its burden.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR,

⁵ With the Employer's request for review, the Employer attached its corporate tax return from 2003; however, evidence submitted with the request for review will not be considered by the Board. *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 12, 1989) (*en banc*).

such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.*, however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.